A

DATO' JOSEPH CHONG CHEK AH & ANOR v. AMCARD SERVICES BHD

COURT OF APPEAL, PUTRAJAYA
ALIZATUL KHAIR OSMAN JCA
DAVID WONG DAK WAH JCA
B PRASAD SANDOSHAM ABRAHAM JCA
[CIVIL APPEAL NO: B-02(A)-1728-10-2015]
16 DECEMBER 2016

C ***LAND LAW:*** *Lien – Lien holder's caveat – Creation of lien over property to secure payment of balance judgment debt – High Court Judge allowed application pursuant to s. 281 of the National Land Code to sell property to satisfy judgment sum – Appeal against – Whether a lien holder caveatee may realise its asset without first obtaining a judgment of the court for the amount due to it under lien – Whether creation of security by way of lien on title only for benefit of registered*
D *proprietor – Whether extends to third party borrowers – Whether entry of lien holder's caveat must be made contemporaneously with grant of loan – Whether caveatee can rely on judgment entered into between caveator and caveatee before creation of lien holder's caveat – Whether enforcement of lien holder's caveat intended by parties*

E ***STATUTORY INTERPRETATION:*** *National Land Code – Section 281 – Whether speaks of holder of any lien 'obtaining judgment for the amount due' – Whether limited to creation of security by way of lien on title only for benefit of registered proprietor – Whether extends to third party borrowers – Whether the whole purpose of a lien holder's caveat is to allow statutory lien to be created as a*
F *form of security over land*

This was an appeal by the appellants against the decision of the High Court allowing an application by the respondent pursuant to s. 281 of the National Land Code ('NLC') to sell a property to satisfy a judgment sum of RM7,075,000 under a lien holder's caveat on the aforesaid property.
G Westmont Holdings Sdn Bhd ('Westmont') had taken out an Arab Malaysia Share Facilities Account facility for the sum of RM39,336,594.00 from the respondent. As Westmont was related to the first appellant, he executed a letter of guarantee to the respondent as security for the aforesaid facilities. Westmont, however, had defaulted in the repayment of the facilities, thus the
H respondent took legal proceedings against both Westmont and the first appellant which resulted in a consent judgment entered against the first appellant in the sum of RM15,000,000. The first appellant, pursuant to the consent judgment, paid the respondent a sum of RM6,750,000 leaving a balance sum of RM8,250,000 As the first appellant had not made any further
I repayment, the respondent took out bankruptcy proceedings against the first appellant. In view of the bankruptcy action, the first appellant made three

further payments totalling RM1,175,000 to the respondent, leaving a balance outstanding of RM7,075,000. To resolve as to how the first appellant was to repay the said amount, the respondent held a meeting with the first appellant where it was agreed *vide* a settlement agreement that, *inter alia*, the respondent was entitled to create a lien holder's caveat over a semi-detached house (property) jointly owned by the first and second appellants. The first appellant, however, had breached the terms and the respondent proceeded with their bankruptcy proceedings. Apart from making the first appellant a bankrupt, the respondent took out an application to sell the property of the first and second appellants under the lien holder's caveat which the High Court sustained. The issues that arose were (i) whether a lien holder caveatee may realise its asset without first obtaining a judgment of the court for the amount due to it under the lien; and (ii) can a caveatee rely on a judgment entered into between the caveator and the caveatee before the creation of the lien holder's caveat as the judgment required to be obtained under s. 281(2) of the NLC.

Held (dismissing appeal with costs)
Per David Wong Dak Wah JCA delivering the judgment of the court:

(1) Section 281(2) of the NLC speaks of the holder of any lien 'obtaining judgment for the amount due to him'. The operative phrase there simply is 'judgment for the amount due' which the respondent had obtained against the first appellant for the amount due, namely the consent judgment entered against the first appellant in the sum of RM15,000,000. The aforesaid provision did not require judgment to be obtained against the second appellant. The second appellant was not a borrower of the respondent. However, that did not preclude her from providing security by way of a lien for the benefit of a third party debtor, that was, the first appellant in this case. (paras 14 & 15)

(2) Section 281 of the NLC is not limited to the creation of a security by way of a lien on title only for the benefit of a registered proprietor. It extends to third party borrowers as well. Nevertheless, as the second appellant was not a borrower of the respondent, there was no basis in law for the respondent to sue and obtain a judgment against her for the amount due. The respondent would have no cause of action against the second appellant. It was sufficient for the purpose of s. 281(2) NLC that the second appellant as co-proprietor had expressly consented to the creation of the lien over the property. (paras 16-18)

(3) The lien holder's caveat was created pursuant to the terms of the settlement agreement as security for the repayment of the outstanding sum of RM7,075,000 (the said outstanding sum) which sum was due and payable under the consent judgment in respect of the loan facility

granted to Westmont by the respondent. Thus, the grant of the lien over the property was essentially to secure repayment of the loan granted by the respondent to Westmont, the payment of which was guaranteed by the first appellant. Although the lien holder's caveat appeared to have been lodged after the loan was granted, there was no requirement that the entry of the lien holder's caveat must be made contemporaneously with the grant of the loan. (paras 21 & 22)

(4) As the consent judgment was a judgment for the amount due under the loan, then based on s. 281(2) of the NLC, the respondent could accordingly rely on the said consent judgment to enforce the lien. The fact that the judgment was obtained prior to the creation of the lien holder's caveat was not a bar to the respondent enforcing the same under s. 281(2) of the NLC. The whole purpose of a lien holder's caveat is to allow statutory lien to be created as a form of security over land. (paras 23 & 24)

(5) This enforcement of the lien holder's caveat by the respondent was nothing more than what the parties had intended and that was to secure repayment of the balance judgment debt of the first appellant arising from the loan granted by the respondent through the creation of the lien holder's caveat of the property. The second appellant could not deny such arrangement or agreement as she had given written consent to the aforesaid caveat. (para 25)

Bahasa Malaysia *Headnotes*

Ini adalah rayuan perayu-perayu terhadap keputusan Mahkamah Tinggi membenarkan permohonan responden di bawah s. 281 Kanun Tanah Negara ('KTN') untuk menjual hartanah bagi memenuhi jumlah penghakiman RM7,075,000 di bawah kaveat pemegang tanah hartanah tersebut. Westmont Holdings Sdn Bhd ('Westmont') telah mengeluarkan kemudahan Arab Malaysian Share Facilities Account bagi jumlah RM39,336,594 daripada responden. Oleh kerana Westmont mempunyai hubungan dengan perayu pertama, beliau telah menandatangani surat jaminan kepada responden sebagai sekuriti bagi kemudahan tersebut. Westmont, walau bagaimanapun, gagal membuat pembayaran balik kemudahan tersebut, oleh itu responden mengambil tindakan undang-undang terhadap perayu pertama dalam jumlah RM15,000,000. Perayu pertama, menurut penghakiman persetujuan, membayar responden sejumlah RM6,750,000 meninggalkan baki RM8,250,000. Apabila perayu pertama gagal membuat pembayaran balik selanjutnya, responden mengeluarkan prosiding kebankrapan terhadap perayu pertama. Mengambil kira tindakan kebankrapan, perayu pertama membuat tiga lagi bayaran berjumlah RM1,175,000 kepada responden, meninggalkan baki RM7,075,000. Untuk menyelesaikan bagaimana perayu pertama perlu membayar balik jumlah tersebut, responden mengadakan

mesyuarat dengan perayu pertama di mana telah dipersetujui melalui persetujuan penyelesaian, antara lain, responden berhak mewujudkan kaveat pemegang lien ke atas sebuah rumah berkembar (hartanah) yang dimiliki bersama oleh perayu pertama dan kedua. Perayu pertama, walau bagaimanapun, telah melanggar syarat-syarat tersebut dan responden meneruskan prosiding kebankrapan. Selain daripada membuatkan perayu pertama seorang bankrap, responden membuat permohonan untuk menjual hartanah perayu pertama dan kedua di bawah kaveat pemegang lien yang dikekalkan oleh Mahkamah Tinggi. Isu-isu yang timbul adalah (i) sama ada kaveat penanggung lien boleh merealisasikan asetnya tanpa memperolehi penghakiman mahkamah untuk jumlah yang perlu dibayar di bawah lien; dan (ii) sama ada penanggung kaveat boleh bergantung kepada penghakiman yang dimasuki antara pengkaveat dan penanggung kaveat sebelum wujudnya kaveat pemegang lien sebagai penghakiman yang perlu diperolehi di bawah s. 281(2) KTN.

Diputuskan (menolak rayuan dengan kos)
Oleh David Wong Dak Wah HMR menyampaikan penghakiman mahkamah:

(1) Seksyen 281(2) KTN menyatakan mengenai pemegang lien 'obtaining judgment for the amount due to him'. Frasa berkuat kuasa di situ adalah 'judgment for the amount due' yang diperolehi responden terhadap perayu pertama untuk jumlah yang perlu dibayar, iaitu penghakiman persetujuan yang dimasukkan terhadap perayu pertama dalam jumlah RM15,000,000. Peruntukan tersebut tidak memerlukan penghakiman diperolehi terhadap perayu kedua. Perayu kedua bukan peminjam responden. Walau bagaimanapun, itu tidak menghalangnya menyediakan sekuriti melalui lien bagi kepentingan penghutang pihak ketiga, iaitu, perayu pertama dalam kes ini.

(2) Seksyen 281 KTN tidak terhad pada kewujudan sekuriti melalui lien hanya untuk kepentingan tuan punya berdaftar. Ia menjangkau kepada peminjam pihak ketiga. Walau bagaimanapun, oleh kerana perayu kedua bukan peminjam responden, tiada asas dalam undang-undang untuk responden menyaman dan memperolehi penghakiman terhadapnya untuk jumlah yang perlu dibayar. Responden tidak mempunyai kausa tindakan terhadap perayu kedua. Adalah memadai untuk tujuan s. 281(2) KTN bahawa perayu kedua sebagai tuan punya bersama telah dengan nyata membenarkan kewujudan lien ke atas hartanah.

(3) Kaveat pemegang lien diwujudkan menurut syarat-syarat perjanjian penyelesaian sebagai sekuriti untuk pembayaran balik jumlah tertunggak RM7,075,000 ('jumlah tertunggak tersebut') yang jumlahnya perlu dibayar di bawah penghakiman persetujuan berhubungan kemudahan

pinjaman yang diberikan kepada Westmont oleh responden. Oleh itu, pemberian lien ke atas hartanah itu pada dasarnya untuk mendapatkan pembayaran balik yang diberikan oleh responden kepada Westmont, yang bayarannya dijamin oleh perayu pertama. Walaupun kaveat pemegang lien telah dikemukakan selepas pinjaman dibenarkan, tiada keperluan bahawa kemasukan kaveat pemegang lien harus dilaksanakan pada waktu yang sama pinjaman dibenarkan.

(4) Oleh kerana penghakiman persetujuan adalah penghakiman untuk jumlah yang perlu dibayar di bawah pinjaman, berdasarkan s. 281(2) KTN, responden boleh bergantung pada penghakiman persetujuan tersebut untuk menguatkuasakan lien. Fakta bahawa penghakiman diperolehi sebelum kewujudan kaveat pemegang lien bukan satu penghalang kepada responden untuk menguatkuasakannya di bawah s. 281(2) KTN. Tujuan keseluruhan kaveat pemegang lien adalah untuk membenarkan lien statutori diwujudkan sebagai bentuk sekuriti ke atas tanah.

(5) Penguatkuasaan kaveat pemegang lien oleh responden adalah apa yang diniatkan oleh pihak-pihak terlibat untuk menjamin pembayaran baki penghakiman hutang perayu pertama yang berbangkit daripada pinjaman yang diberikan oleh responden melalui kewujudan kaveat pemegang lien hartanah. Perayu kedua tidak boleh menafikan pengaturan atau persetujuan itu kerana beliau telah memberikan kebenaran secara bertulis kaveat tersebut.

Case(s) referred to:

Heap Huat Rubber Co Sdn Bhd v. United Overseas Bank Ltd [1992] 3 CLJ 1589; [1992] 2 CLJ (Rep) 496 HC ***(refd)***

United Overseas Bank (Malaysia) Sdn Bhd v. UJA Sdn Bhd & Another Appeal [2010] 6 CLJ 204 CA ***(refd)***

Legislation referred to:

Bankruptcy Act 1967, s. 38(1)(a)

National Land Code, s. 281(2)

Other source(s) referred to:

Teo Keang Sood & Khaw Lake Tee, *Land Law In Malaysia, Cases and Commentary*, 3rd edn, p 729

For the appellant - Jadadish Chandra; M/s Arbain & Co

For the respondent - Harmeet Singh & Chan Mun Fei; M/s Raja Eleena Siew Ang & Assocs

[Editor's note: For the High Court judgment, please see AmCard Services Berhad v. Dato' Joseph Chong Chek Ah & Anor [2015] 1 LNS 1349 (affirmed).]

Reported by Suhainah Wahiduddin

JUDGMENT

David Wong Dak Wah JCA:

Introduction

[1] This is an appeal by the appellants/defendants against the decision of the High Court in which the learned judge allowed an application by the respondent/plaintiff pursuant to s. 281 of the National Land Code to sell a property to satisfy a judgment sum of RM7,075,000 under a lien holder's caveat on the aforesaid property.

[2] We heard the appeal and after due consideration to respective submissions of counsel, we dismissed the appeal. We now give our reasons for our decision.

Background Facts

[3] The facts are largely undisputed and they are these. Westmont Holdings Sdn Bhd (Westmont) on 13 April 1996 took out an Arab Malaysia Share Facilities Account facility for the sum of RM39,336,594 from the respondent. As Westmont is related to the first appellant, he executed a letter of guarantee to the respondent also on 13 April 1996 as security for the aforesaid facilities.

[4] As Westmont had defaulted in the repayment of the facilities, the respondent took legal proceedings against both Westmont and first appellant under suit - Kuala Lumpur High Court C/S No. D3-22- 2990-1998. This suit resulted in a consent judgment entered against the first appellant on 14 October 2004 in the sum of RM15,000,000. Westmont later was wound up by a third party on 31 May 2002.

[5] The first appellant pursuant to the consent judgment had, as at 9 April 2007, paid the respondent a sum of RM6,750,000 leaving a balance sum of RM8,250,000. As the first appellant had not made any further repayment, the respondent took out bankruptcy proceedings against the first appellant at the Johor Bahru High Court under No. 29-1080-2007 on 9 April 2007. In view of the bankruptcy action, the first appellant made three further payments totalling RM1,175,000 to the respondent, leaving a balance outstanding of RM7,075,000.

[6] To resolve as to how the first appellant is to repay RM7,075,000, the respondent held a meeting with the first appellant on 9 June 2009 where it was subsequently agreed *vide* a settlement agreement entered into on or about 23 September 2009, *inter alia*, as follows:

(i) The first appellant to pay the respondent RM75,000 per month from June 2009 until November 2009 and the remaining RM6.7 million to be fully paid by 31 December 2009;

(ii) The respondent was entitled to create a lien holder's caveat over a semi-detached house (property) located at Glenmarie Subang, jointly owned by the first and second appellants;

(iii) The creditor's petition fixed on September 2009 would be adjourned subject to the first appellant complying with the above terms and upon the successful creation of the lien holder's caveat over the property;

(iv) In the event the first appellant defaults in his instalment payment, the respondent is entitled to recall and recover the balance outstanding owing to the respondent

[7] The lien holder's caveat was created and duly registered on 28 July 2009. This was made possible by the depositing by the first appellant of the original title to the property and a consent letter dated 24 June 2009 signed by the second appellant for the creation of the lien holder's caveat.

[8] The first appellant only made one payment of RM75,000 on 11 June 2009 pursuant to the agreed terms set out above. In view of this breach by the first appellant, the respondent proceeded with their bankruptcy proceedings and on 25 November 2009, an adjudicating order and receiving order were obtained against the first appellant.

[9] Apart from making the first appellant a bankrupt, the respondent took out an application to sell the property of the first and second appellants under the lien holder's caveat which the High Court sustained which has resulted in this appeal.

Our Grounds Of Decision

[10] From the outset, we were informed by counsel for the respondent that the learned judge in the High Court did not allow the first appellant to participate in the proceeding as he was and still is an undischarged bankrupt. Before us learned counsel for the first appellant conceded that the appeal before us, concerned only the second appellant as no sanction had been obtained by the first appellant from the Director General of Insolvency under s. 38(1)(a) of the Bankruptcy Act 1967. We were also informed by counsel for the respondent that the Director General of Insolvency is not objecting to the sale of the property. No rebuttal was forthcoming by learned counsel for the second appellant, hence we assumed that to be accurate.

[11] Learned counsel for the second appellant from the outset of his submission set out the issues which we needed to deliberate and they were these:

(i) whether a lien holder caveatee may realise its asset without first obtaining a judgment of the court for the amount due to it under the lien?

(ii) can a caveatee rely on a judgment entered into between the caveator and caveatee before the creation of the lien holder's caveat as the judgment required to be obtained under s. 281(2) of the National Land Code?

[12] We were agreeable to the stand taken by learned counsel for the second appellant, hence we determined the fate of the appeal by deliberating on those two issues.

[13] Our starting point was s. 281 of the National Land Code which provides as follows:

> (1) Any proprietor or lessee for the time being may deposit with any other person or body, as security for a loan, his issue document of title or, as the case may be, duplicate lease; and that person or body:
>
> (a) may thereupon apply under Chapter 1 of Part Nineteen for the entry of a lien holder's caveat; and
>
> (b) shall, upon the entry of such a caveat, become entitled to a lien over the land or lease.
>
> (2) Where the holder of any lien has obtained judgment for the amount due to him thereunder, he shall be entitled to apply to the Court for, and obtain forthwith, an order for the sale of the land or lease.
>
> (3) Any such application shall be made in accordance with any law for the time being in force relating to civil procedure; and the provisions of sections 257 to 259 and section 266 to 269 shall apply, *mutatis mutandis*, where any such application has been made as they apply where a chargee applies for an order under section 256.

[14] Learned counsel for the second appellant in respect of issue (i) submitted that as there was no judgment obtained by the respondent against the second appellant, the respondent had not complied with s. 281(2) which referred to "the holder of any lien" having obtained judgment. Learned counsel took the position that until and unless the respondent obtained a judgment against the second appellant (which there was none), the respondent was barred from applying to the court to sell the property. With respect, s. 281(2) speaks of the holder of any lien "obtaining judgment for the amount due to him". The operative phrase there simply is "judgment for the amount due" which the respondent has obtained against the first appellant for the amount due, namely the consent judgment entered against the first appellant on 14 October 2004 in the sum of RM15,000,000. The aforesaid provision does not require judgment to be obtained against the second appellant.

[15] The second appellant is not a borrower of the respondent. However, that does not preclude her from providing security by way of a lien for the benefit of a third party debtor, that is, the first appellant in this case.

[16] Section 281 of the NLC, in other words, is not limited to the creation of a security by way of a lien on title only for the benefit of a registered proprietor. It extends to third party borrowers as well (per Gopal Sri Ram FCJ in *United Overseas Bank (Malaysia) Sdn Bhd v. UJA Sdn Bhd & Another Appeal* [2010] 6 CLJ 204; [2009] 6 MLJ 857).

[17] Nevertheless, as the second appellant is not a borrower of the respondent, there is no basis in law for the respondent to sue and obtain a judgment against her for the amount due. The respondent would have no cause of action against the second appellant.

[18] It is sufficient for the purpose of s. 281(2) of the NLC that the second appellant as co-proprietor had expressly consented to the creation of the lien over the property. (See exh. YCC pp. 142-145 record of appeal Jld 2 Bah C)

[19] Our interpretation of s. 281(2) of the NLC is also consistent with the views expressed by the learned authors in *Land Law In Malaysia, Cases and Commentary*, 3rd edn, by Teo Keang Sood and Khaw Lake Tee at p. 729 (para. 8.45):

> It may be noted, however, that it is not a prerequisite for the valid entry of a lien holder's caveat that the issue document of title or duplicate lease be deposited as security for a loan granted in favour of only the registered proprietor or lessee and not a third party. Such a requirement would unduly undermine the usefulness of a statutory lien as a form of security over land provided under the Code. All that is necessary under section 330(1) of the National Land Code is that before a lien-holder's caveat can be entered, the issue document of title or duplicate lease must have been deposited (by the registered proprietor or lessee) as security for a loan, whether or not granted in favour of them. It may also be noted that there is no requirement that the entry of the lien holder's caveat must be made contemporaneously with the grant of the loan (*Heap Huat Rubber Co. Sdn Bhd v. United Overseas Bank Ltd* [above]).

[20] As for issue (ii), we answered in the affirmative as we saw no reason why a judgment entered prior to the creation of the lien holder's caveat cannot be used to enforce the same.

[21] In this regard, it should be noted that the lien holder's caveat was created pursuant to the terms of the settlement agreement (*supra*) as security for the repayment of the outstanding sum of RM7,075,000 (the said outstanding sum) which sum was due and payable under the consent judgment dated 14 October 2004 in respect of the loan facility granted to Westmont by the respondent. Thus the grant of the lien over the property was essentially to secure repayment of the loan granted by the respondent to Westmont, the payment of which was guaranteed by the first appellant.

[22] Although the lien holder's caveat appears to have been lodged after the loan was granted, yet as observed by the learned authors Teo Keang Sood and Khaw Lake Tee in their book *Land Law In Malaysia, Cases and Commentary*, 3rd edn referred to earlier it would appear on the authority of *Heap Huat Rubber Co Sdn Bhd v. United Overseas Bank Ltd* [1992] 3 CLJ 1589; [1992] 2 CLJ (Rep) 496 "there is no requirement that the entry of the lien holder's caveat must be made contemporaneously with the grant of the loan".

[23] As the consent judgment of 14 October 2004 is a judgment for the amount due under the loan, then based on s. 281(2) of the NLC, the respondent can accordingly rely on the said consent judgment to enforce the lien. The fact that the judgment was obtained on 14 October 2004, that is prior to the creation of the lien holder's caveat on 28 July 2009 is not a bar to the respondent enforcing the same under s. 281(2) of the NLC.

[24] The whole purpose of a lien holder's caveat is to allow statutory lien to be created as a form of security over land. To accede to the submission of the appellant would derail the purpose of the regime of statutory lien.

Conclusion

[25] This enforcement of the lien holder's caveat by the respondent here was to us nothing more than what the parties had intended and that was to secure the repayment of the balance judgment debt of the first appellant arising from the loan granted by the respondent through the creation of the lien holder's caveat of the property. The second appellant cannot deny such arrangement or agreement as she had given written consent to the aforesaid caveat.

[26] For reasons stated above, we dismissed this appeal with costs in the sum of RM5,000 subject to payment of allocator fees. We also ordered that the deposit be refunded to the appellant.